

**CUSTOMS, EXCISE & SERVICE TAX APPELLATE
TRIBUNAL, MUMBAI
REGIONAL BENCH**

Excise Miscellaneous Application No. 85469 of 2022

(On behalf of Appellant)

Excise Appeal No. 966 of 2012

(Arising out of Order-in-Appeal No. BC/21/BEL/2012-13 dated 27.04.2012 passed by the Commissioner of Central Excise (Appeals), Mumbai-III)

M/s. Alok Industries Ltd.

Appellant

16/2, TTC Industrial Area,
MIDC, Pawane 400 705.

Vs.

Commissioner of Central Excise, Belapur

Respondent

1st Floor, CGO Complex, CBD Belapur,
Navi Mumbai 400 614.

AND

Excise Appeal No. 85432 of 2019

(Arising out of Order-in-Appeal No. PK/167/MC/2018 dated 09.03.2018 passed by the Commissioner of CGST & Central Excise (Appeals-II), Mumbai)

M/s. Alok Industries Ltd.

Appellant

Peninsula Corporate Park,
Lower Parel, Mumbai 400 013.

Vs.

Commissioner of Cen. Excise, Mumbai Central Respondent

4th Floor, GST Bhavan, 115, M.K. Road,
Churchgate, Mumbai 400 020.

Appearance:

Shri Vipin Jain with Shri Sunil Navaldhar, Advocates, for the Appellant
Shri Sanjay Hasija, Superintendent, Authorised Representative for the Respondent

Ms. Anuradha Parab, Assistant Commissioner, Authorised Representative for the Respondent

CORAM:

HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

HON'BLE MR. AJAY SHARMA, MEMBER (JUDICIAL)

Date of Hearing: 29.06.2022

Date of Decision: 19.10.2022

FINAL ORDER NO. A/85969-85970/2022

PER: SANJIV SRIVASTAVA

These appeals are directed against order-in-appeal as detailed in the table below, of the Commissioner of CGST & Central Excise (Appeals), Mumbai.

Appeal No		Order in Appeal No	Date
E/966/2012	Commissioner (Appeals) Mumbai III	E/BC/91/BEL/2012-13	27.04.22012
E/85432/2019	Commissioner of CGST & Central Excise (Appeals) Mumbai -II	PK/167/MC/2018	09.03.2018

1.2 Appellant has filed Miscellaneous Application No. E/MISC/85469/2022 in appeal No E/966/2012.

1.3 Since the grounds raised in the miscellaneous application are identical these appeals and application have been taken up for consideration simultaneously.

1.4 At the outset leaned counsel for the appellant submits that he does not contests the order in appeal on merits, but would like the matters to be decided on the issues raised in the miscellaneous application filed by the appellants.

2.1 The chronology leading to filing this miscellaneous application is as detailed in the table below:

Period of Dispute in E/966/2012	2004-2009
Period of Dispute in E/85432/2019	2008-2015
Date of Commencement of Corporate Insolvency Resolution Process (CIRP) i.e. admission of Petition by NCLT under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC).	18.07.2017
Date of Public Announcement of CIRP by the Resolution Professional appointed by NCLT.	19.07.2017
Date of the Resolution Plan.	12.04.2018
Date of Approval of the Resolution Plan by the Committee of Creditors.	20.06.2018
Date of the NCLT Order approving the Resolution	08.03.2019

Plan	
Closing date (i.e. the date on which all the implementation steps set-out in Annexure 2 to Resolution Plan are completed)	14.09.2020

2.2 The Appellant is engaged in the manufacture of excisable goods falling under Chapter 52, 54, 55, 56 and 63 of the Central Excise Tariff Act, 1985. Appellant, at the relevant time, availed Cenvat credit on inputs, input services and capital goods for the manufacture of the said goods. Alleging short payment of duty by the impugned order dated 27.04.2012 a demand of Rs 22,08,161/- for the period 2004-2009 was confirmed against them. Further by impugned order dated 09.03.2018 demand proposing reversal of CENVAT Credit of Rs 2,23,607/- for the period 2008-15 has been made against them.

2.3 While the above matters were pending disposal before the Hon'ble CESTAT, the Appellant had undergone proceedings under the Insolvency and Bankruptcy Code 2016 (IBC).

2.4 Therefore Appellant had filed this Miscellaneous Application urging for incorporation of additional ground to the effect that since the period involved in these Appeals is prior to the closing date (i.e.14.09.2020) and in terms of the Resolution Plan dated 12.04.2018, all such demand/liabilities which relate to the period prior to the closing date (i.e.14.09.2020) shall be immediately, irrevocably and unconditionally stand fully and finally discharged and settled, thus the impugned orders passed by the Commissioner (Appeals) be set aside.

3.1 We have heard Shri Vipin Jain with Shri Sunil Navaldhar, Advocates for the applicant/appellant and Shri Sanjay Hasija, Superintendent, and Ms. Anuradha Parab, Assistant Commissioner, Authorized Representatives for the revenue.

3.2 Arguing for the appellant/applicant learned counsel submits that,-

- CIRP under the IBC was initiated against the appellant, by its financial creditors viz. State Bank of India in terms of Section 7 of the IBC. The NCLT admitted the said petition on 18.07.2017 and appointed a Resolution Professional for

undertaking the said proceedings. The Resolution Professional under the IBC made public announcement regarding commencement of CIRP, and invited Expressions of Interest (EOI) from prospective Resolution Applicants for presenting Resolution Plans for rehabilitating the corporate debtor. In addition, it also invited from the operational creditors (which includes the Central Government) to submit its claim against the Corporate Debtor under Regulation 7 of the Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 (IBBI Regulations for short).

- In terms of the approved Resolution Plan, all payments to the operational creditors including the Central Government, in relation to the statutory dues, which includes the present Respondent, whose liability was in excess of Rs 3,00,000/- for the period prior to the closing date viz 14.09.2020 (i.e. the date on which all the implementation steps as set out in Annexure 2 to the Resolution Plan are completed) were settled at Nil. Therefore the claims which arise relating to the period prior to the closing date, the Resolution Plan clearly provided that no further payments are due to and all liabilities of the operational creditors stand fully and finally satisfied and settled.
- Section 31(1) of the IBC provides for the binding nature of the Resolution Plan. In terms of Section 31(1) of the IBC, the approved resolution plan shall be binding on the corporate debtor and its creditors, including the Central Government, any State Government to whom a debt in respect of the payment of dues arising under any law for the time being in force.
- In view of the above, the Appellant submits that since the demand confirmed vide the impugned Orders relates to the period (i) 2004-05 to 2008-09 and (ii) 2008-09 to 2014-15, which is prior to the Closing Date (i.e.14.09.2020), the same shall immediately, irrevocably and unconditionally stand fully and finally discharged and settled as per the

Resolution Plan and no action or proceedings can be initiated against the Appellant for its recovery.

- the Resolution Plan approved by the NCLT is binding on all stakeholders, which includes the Central Government. Therefore, as provided in the approved Resolution Plan, the Appellant shall have no liability towards any operational creditors with regard to any claims relating in any manner to the period prior to the Closing Date (i.e.14.09.2020) and all such liabilities shall be immediately, irrevocably and unconditionally stand fully and finally discharged and settled, with there being no further claims whatsoever.
- legal position in this regard has been settled by settled the decisions of the Hon'ble Supreme Court in the case of
 - Committee of Creditors of Essar Steel Ltd., vs. Satish Kumar Gupta & Ors (2020) 8 SCC 531
 - Ghanashyam Mishra & Sons Pvt. Ltd. vs. Edelweiss ARC reported in (2021) 9 SCC 657
- CBIC vide Instruction No.1083/04/2022-CX9 dated 23.05.2022 has laid down the guidelines (SOP) for NCLT cases. CBIC has made it clear that it is a settled position that no claims can be raised and further demands be made by the Department once the Resolution Plan is approved and the company is taken over.
- They had paid certain amounts during the course of investigation as also while filing the appeals before this Hon'ble Tribunal, a part of the duty demanded is paid/ treated as a pre-deposit. As the entire demand stands extinguished as no claim was filed by the Department before the IRP, the amounts/duty paid by the Appellant as pre-deposit is liable to be refunded to it with interest as has been held by the Hon'ble Supreme Court's judgement in the case of Ruchi Soya Industries Ltd. vs. Union of India reported in 2022 (380) ELT 8 (SC).
- Rule 22 of the CESTAT (Procedure) Rules, 1982 providing for the abatement of appeal in certain circumstances is not applicable in this present case.

3.3 Arguing for the revenue learned authorized representative submits that:

- Subsequent to the order of the NCLT approving the resolution plan, the appeal stands abated and all the issues arising out of the order appealed against have acquired finality with the said order of NCLT approving the resolution plan.
- The Hon’ble Bombay High Court has in case of Godrej and Boyce Manufacturing Company [2009 (233) ELT 446 (Bom)] clearly laid down the conditions in which the doctrine of merger is applicable. In the present case order of lower authorities now stands merged with the order of the NCLT, and appeal filed before the CESTAT abates in terms of Rule 22 of the CESTAT Procedure Rules.

4.1 We have considered the submissions made by both the sides.

4.2 Undisputedly the proceedings against the appellant in the present two appeals had been initiated against the appellant in these two appeals under Section 7 of the Insolvency and Bankruptcy Code, 2016 (IBC) on 18.07.2017. Public Announcement in this regards was made by the Resolution Professional appointed by NCLT on 19.07.2017. Resolution Plans were submitted by the various parties including, a consortium of J M Financial Asset Reconstruction Company and JMFARC- march 2018-Trust (together called JM) and Reliance Industries Limited (RIL) (collectively called Resolution Applicant). The plan dated 12.04.2018 filed by the Resolution Applicant was approved by the NCLT vide its order dated 8th March 2019. Certain clarifications and corrections in the order dated 8th march 2019 were made by the order dated 26th July 2019. Relevant extracts from the order of the NCLT necessary for us reproduced below:

SI No 4 in table appended in para 14 of order dated 8th March 2019 as corrected by order dated 26th July 2019 reads as follows:

S No	Section/ Regulation	Requirement of the Code and CIR	Clause of the Resolution Plan
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		regulations	
4	Section 30 (2) (c) of the Code	(c) provide for the management of the affairs of the corporate debtor after the approval of resolution plan.	Clause 7 of the Resolution Plan provides for the management of the corporate debtor for (a) the period between the NCLT approval date and closing date and (b) the period following the closing date. In terms of Clause 7.1.1 of the Resolution Plan, from the date of approval from the NCLT till the receipt of approval from the competition commission of India ("CCI") the corporate debtor will be managed by a monitoring committee ("MC") which is comprised of the erstwhile resolution professional (as he will become after the Resolution Plan) and 4 representatives of the Financial Creditors. During the period following the approval of the CCI until the closing date, the corporate debtor will be managed by a reconstituted MC comprising of 4 representatives of the Financial Creditors, 2 representatives of the Resolution applicants and the erstwhile Resolution professional. After the

			<i>closing date, a new board of Directors constituted by the Resolution Applicants will replace the MC and it will have adequate representation from the members of the Resolution Applicants and as requirements under applicable law.</i>
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Para 1.2 of the order dated 26th July 2019

1.2 In this regard, this bench is of the view that, after the approval of the Resolution Plan, the control and management has been transferred to successful Resolution Applicant(s) i.e. (present applicant). Now it is prerogative of the applicant to approach any bank(s) as per their choice and convenience and it is also prerogative of any Bank(s)/ third party lender(s), whichever it may be, to disburse any loan as per their/his own term(s) and condition(s). Hence, Successful Applicant may approach any bank(s) / third party lender(s) of their own choice, further approval of plan does not bar any bank(s) /ender(s) to disburse any loon on their own terms and conditions, which is/are the sole prerogative of the borrower(s) and lender(s).

Para 27 of order dated 8th March 2019

27. In this regard, this Adjudicating Authority is of the view that Clause No. 3.2.3(iii) at Page No. 19 of the Resolution Plan viz. all legal proceedings initiated before any forum by or on behalf of the financial creditors to enforce any rights or claims against the Company/Corporate Debtor or enforce or invoke any security, interest and/or guarantee, over the assets of the Company/Corporate Debtor, shall immediately, irrevocably and unconditionally stand withdrawn, abetted, settled and/or extinguished. Provided however any rights or claims of the financial creditors with respect to Existing Promoters Guarantees shall continue against such guarantors". Approval of the Resolution Plan does not mean automatic waiver or abetment of any legal proceedings which are pending by or against the

Company/ Corporate Debtor as those are the subject matter of the concerned Competent authorities having their proper/own jurisdiction to pass any appropriate order as the case may be. The Resolution Applicants on approval of the Plan may approach the Competent Authorities/Courts/Legal Forums/offices-Govt, or Semi Govt./ State or Central Govt. for appropriate relief(s) sought for in Clause No. 3.2.3 (iii) of the Resolution Plan at Page No. 19.

4.3 From the above it is quite evident that with the approval of the resolution plan the corporate debtor was managed by a monitoring committee ("MC") which is comprised of the erstwhile resolution professional (as he will become after the Resolution Plan) and 4 representatives of the Financial Creditors. During the period following the approval of the CCI until the closing date, the corporate debtor will be managed by a reconstituted MC comprising of 4 representatives of the Financial Creditors, 2 representatives of the Resolution applicants and the erstwhile Resolution professional. After the closing date, a new board of Directors constituted by the Resolution Applicants will replace the MC and it will have adequate representation from the members of the Resolution Applicants and as requirements under applicable law. Further it is also quite evident that control and management of the corporate debtor has passed on to the resolution applicants who in turns are successor interest in the management of the corporate debtor and have been authorized specifically to approach any Competent Authorities/Courts/Legal Forums/offices-Govt, or Semi Govt./ State or Central Govt. for appropriate relief(s). Thus it is quite evident that on the date of approval of the resolution plan, the successor interest to the corporate debtor has been appointed who has been asked given the resolution authority to represent before the relevant authorities.

4.4 Rule 22 of the CESTAT Procedure Rules, 1982 reads as follows:

"RULE 22. Continuance of proceedings after death or adjudication as an insolvent of a party to the appeal or application. —

Where in any proceedings the appellant or applicant or a respondent dies or is adjudicated as an insolvent or in the case of a company, is being wound up, the appeal or application shall abate, unless an application is made for continuance of such proceedings by or against the successor-in-interest, the executor, administrator, receiver, liquidator or other legal representative of the appellant or applicant or respondent, as the case may be :

Provided that every such application shall be made within a period of sixty days of the occurrence of the event :

Provided further that the Tribunal may, if it is satisfied that the applicant was prevented by sufficient cause from presenting the application within the period so specified, allow it to be presented within such further period as it may deem fit."

Learned advocate has labored to explain why this rule should not be made applicable in his case. However in view of the fact as stated in the para 4.2 and 4.3 above we are of the view that moment the successor interest with sufficient rights to be represented is appointed by the NCLT this rule will become applicable and it is for the successor interest to make an application for continuance of the proceedings. In the present case no such application has been filed by the successor interest for the continuance of the proceedings and hence the appeal stands abated by the operation of this rule.

4.5 Resolution plan specifically has in respect of operational creditors states as follows:

"3.3 Operational Creditors (including the Central Government, State Government or any local authority)

3.3.1 Amount to be paid to Operational Creditors pursuant to this Plan As per the Information Memorandum, the liquidation value of the Company is Rs. 4433,00,00,000 (Rupees Four Thousand Four Hundred Thirty Three Crores only), which is less than the sum of Estimated CIRP Costs and Outstanding Financial Debt, therefore, the liquidation value available to Operational Creditors (other than employees and workmen who have been dealt with separately under section 3.4 below) is NIL. Accordingly, no amounts are proposed to be paid under this Plan

to the Operational Creditors (other than (i) employees and workmen who have been dealt with separately under Section 3.4 below; and (ii) the dues owed by the Company to certain Operational Creditors (to each of whom the Company, as on the Insolvency - Commencement Date, owes upto Rs. 3,00,000/- (Rupees Three lakhs) and whose details are set out in Annexure 9), which dues aggregates to Rs. 4,83,47,321/ (Rupees Four Crores Eighty Three Lakhs Forty Seven Thousand Three Hundred Twenty One). If any further claims of Operational Creditors (other than employees and workmen who have been dealt with separately under Section 3.4 below), relating to the period prior to the Closing Date arise and/or are made and/or are admitted, then the amounts payable under this Plan to the Operational Creditors (other than (i) employees and workmen who have been dealt with separately under Section 3.4 below; and (ii) the dues owed by the Company to certain Operational Creditors (to each of whom the Company, as on the Insolvency Commencement Date, owes up to Rs. 3,00,000/- (Rupees Three Lakhs) and whose details are set out in Annexure 9)), which aggregates to Rs. 4,83,47,321/- (Rupees Four Crores Eight Three Lakhs Forty Seven Thousand Three Hundred Twenty One) shall remain NIL, and shall not increase."

Pursuant to the foregoing, the company shall have no liability towards any Operational Creditors with regards to any claims (as defined under the IBC) relating in any manner to the period prior to the closing date. All such Liabilities shall immediately, irrevocably and unconditionally stand fully and finally discharged and settled, with there being no further claims whatsoever, and all forms of security created or suffered to exist, or rights to create such a security, to secure any obligations towards the Operational Creditors (whether by way of guarantee, bank guarantee, letters of credit or otherwise) shall immediately, irrevocably and unconditionally stand released and discharged, and the Operational Creditors shall deem to have waived all rights to invoke or enforce the same.

3.3.5 Treatment of claims under Applicable Laws (including Taxes)

(1) All claims that may be or that arise against the Company in relation to any payments required to be made by the Company under Applicable Law (including Taxes), or in relation to any breach, contravention or non compliance of any Applicable Law (including criminal laws), whether or not such claim was notified to or claimed against the Company at such time, and whether or not such Governmental Authority was aware of such claim at such time, in relation to the period prior to the Closing Date, is a "claim" and "debt", each as defined under the IBC, and would consequently qualify as "operational debt" (as defined under the IBC) and therefore, the full amount of such claims shall be deemed to be owed and due as of the Closing Date, the liquidation value of which is NIL and therefore, no amount is payable in relation thereto. (ii) In accordance with the foregoing, all claims (final or contingent, whether dispute or undisputed, and whether notified to or claimed against the Company) of all Governmental Authorities (including in relation to Taxes, and all other dues and statutory payments to any Governmental Authority), relating to the period prior to the Closing Date, shall stand fully and finally discharged and settled.

(iii) All claims that may be made against the Company in relation to any payments required to be made by the Company under Applicable Law, or in relation to any breach, contravention or non-compliance of any Applicable Law (whether or not such claim was notified to or claimed against the Company at such time, and whether or not such Government Authority was aware of such claim at such time), shall be deemed to be owed and due as of the Closing Date, and shall immediately, irrevocably and unconditionally stand abated, settled and extinguished. No Governmental Authority shall have any further rights or claims against the Company, in respect of the period prior to the Closing Date and/or in respect of such amounts.

3.3.6 Failure to Submit Claims or Rejected Claims

(i) The Resolution Professional had issued a public notice dated July 19, 2017 in accordance with the IBC, inviting all creditors of the Company to submit their proof of claims to the Resolution Professional on or Prior to August 01, 2017. The information Memorandum uploaded to the virtual data from time to time

contains details of claims made by all creditors of the Company, including Financial Creditors and Operational Creditors, which have been admitted by the Resolution Professional. Further, under the CIRP Regulations, all creditors are required to submit their proof of claim prior to the approval of the Plan by the CoC. We assume that all persons that have any claim (s) against the Company (including Financial Creditors, Operational Creditors, Other Creditors, Governmental Authorities, persons who have paid any advances to the Company against supply of goods or services by the Company, and persons in respect of whom credit balances were written-back by the Company in the years ended March 31, 2016, March 31, 2017 and March 31, 2018 have all filed their claims and all verifiable claims as on the date of approval of this Plan by the CoC, have been admitted by the Resolution Professional and are disclosed in the Information Memorandum, provided that nothing contained herein shall result in an increase in the Total Financial Outlay proposed under this plan.

(ii) In the event any person that has any claim (s) against the Company (including Financial Creditors, Operational Creditors, Other Creditors, Governmental Authorities, or otherwise), has not submitted its claim(s) (whether or not it was aware of such claim at such time), or if the claim(s) filed by any person has been rejected and/or not been admitted by the Resolution Professional (including any claim against the Company from GAIL (India) Limited arising directly or indirectly under, out of, or in relation to the gas sale agreement dated May 27, 2013 entered into between GAIL (India) Limited and the Company), then: (a) all such obligations, claims and liabilities of the Company (whether final or contingent (whether crystallized or not), whether disputed or undisputed, and whether or not notified to or claimed against the Company; (b) all outstanding disputes or legal proceedings in respect of such claims; and (c) all rights or claims of such persons against the Company; in each case, relating to the period prior to the Closing Date, shall immediately, irrevocably and unconditionally stand extinguished and waived on the Closing Date, and the Company shall have no Liabilities in respect of such claim(s). Provided however any

rights or claims of the Financial Creditors with respect to Existing Promoter Guarantees can continue against such guarantors --

3.3.7 No action by Operational Creditors

Pending the occurrence of the Closing Date, no Operational Creditors shall be entitled to take, initiate or continue any steps or proceedings against the Company or its assets whether by way of demand, legal proceedings, alternative determination process, the levying of distress, in any jurisdiction whatsoever for the purpose of obtaining payment of any Liability, or for the purpose of placing the Company into liquidation or any analogous proceedings."

4.6 There is no dispute to the binding nature of the resolution plan as approved by the NCLT. It has been settled by the Hon'ble Apex Court in the cases referred to by the learned counsel for the applicant. Relevant paras of the said decisions are reproduced below:

a. In the case of Committee of Creditors of Essar Steel Ltd., vs. Satish Kumar Gupta & Ors (2020) 8 SCC 531 Hon'ble Apex Court has also held as follows:

"103..... It is made clear that the CIRP of the corporate debtor in this case will take place in accordance with the resolution plan of Arcelo Mittal dated 23.10.2018, as amended and accepted by the Committee of Creditors on 27.03.2019, as it has provided for amounts to be paid to different classes of creditors by following Section 30(2) and Regulation 38 of the Code."

b. The Hon'ble Supreme Court in the case of Ghanashyam Mishra & Sons Pvt. Ltd. vs. Edelweiss ARC reported in (2021) 9 SCC 657 at para-102 of the judgement has V categorically held as follows -

"102. In the result, we answer the questions framed by us as under: (i) That once a resolution plan is duly approved by the Adjudicating Authority under sub section (1) of Section 31, the claims as provided in the resolution plan shall stand frozen and will be binding on the Corporate Debtor and its employees, members, creditors, including the Central Government, any State Government or any local authority, guarantors and other

stakeholders. On the date of approval of resolution plan by the Adjudicating Authority, all such claims, which are not a part of resolution plan, shall stand extinguished and no person will be entitled to initiate or continue any proceedings in respect to a claim, which is not part of the resolution plan;

(i) 2019 amendment to Section 31 of the I&B Code is clarificatory and declaratory in nature and therefore will be effective from the date on which I&B Code has come into effect;

(iii) Consequently all the dues including the statutory dues owed to the Central Government, any State Government or any local authority, if not part of the resolution plan, shall stand extinguished and no proceedings in respect of such dues for the period prior to the date on which the Adjudicating Authority grants - its approval under Section 31 could be continued. "

4.7 CBIC has vide Instruction No.1083/04/2022-CX9 dated 23.05.2022 has laid down the guidelines (SOP) for NCLT cases. The said instructions at para-1 and 2 records as follows -

"Subject: Standard Operating Procedure (SOP) for NCLT cases in respect of the Insolvency and bankruptcy Code (IBC) - reg

I am directed to inform the Insolvency and Bankruptcy Board of India has requested that role of GST and Customs authorities in certain key issues under the Insolvency and bankruptcy Code, 2016 needs to be formulated. Further, GST and Customs Authorities have been classified as operational creditors and are required to submit their claims against corporate debtors when the Corporate insolvency and resolution process is initiated and public announcement inviting claims is made by the insolvency professional.

2. A timeline of 90 days from the insolvency commencement date is available for filing of claims. However, it has been observed that there is an inordinate delay in filing of claims by Customs and GST authorities. This leads to their claims not being admitted and extinguished once a resolution plan is approved. It is also observed that the authorities then litigate on the rejection of each claims, despite the settled position that no claims can be raised once the plan is approved and no demands

can be raised on the Resolution Application who has taken over the company through such a resolution plan."

4.7 Applicant has claimed refund of pre-deposit as per judgement of Hon'ble Supreme Court in case of Ruchi Soya. [2022 (380) ELT 8 (SC).] holding as follows:

"14. Admittedly, the claim in respect of the demand which is the subject matter of the present proceedings was not lodged by the respondent No. 2 after public announcements were issued under Sections 13 and 15 of the IBC. As such, on the date on which the Resolution Plan was approved by the Learned NCLT, all claims stood frozen, and no claim, which is not a part of the Resolution Plan, would survive.

15. In that view of the matter, the appeals deserve to be allowed only on this ground. It is held that the claim of the respondent, which is not part of the Resolution Plan, does not survive. The amount deposited by the appellant at the time of admission of the appeals along with interest accrued thereon is directed to be refunded to the appellant."

4.8 However from the date of approval of the resolution plan by the NCLT, the appeal filed by the applicant has abated and CESTAT has become functus officio in the matters relating to this appeal. Further it is also settled that the impugned order's in the appeals have got merged in the order of the NCLT approving the Resolution Plan. The decision of the Hon'ble Bombay High Court referred to by the learned Authorized representative clearly lays down the test as in which condition the said doctrine shall apply in following manner

"34. The applicability of the doctrine thus depends on the nature of the Appellate or revisional jurisdiction. The scope of the statutory provisions conferring the appellate or revisional jurisdiction must be first considered. As rightly argued by the Appellants the doctrine of merger is not a doctrine of rigid and universal application. Merely because there are two orders, one by the inferior authority and the other by a superior authority passed in an appeal or revision, it cannot be said that there is a merger of the two orders irrespective of the subject matter of the appellate or revisional order and this scope of the appeal or

revision contemplated by the particular statute. A Court or Tribunal while applying the doctrine must consider the nature of the order and the scope of the statutory provisions conferring the appellate or revisional jurisdiction.

35. The following principles will have to be considered while applying the doctrine of merger in the context of the provisions of "The Central Excise Act, 1944".

1. In the proceedings from which the matter arises, the Court or Tribunal hearing the appeal or revision, should have jurisdiction to decide all issues arising from the said order of the inferior Court or Tribunal from whose order the proceedings arise.

2. The Appeal should not have been dismissed on the ground of limitation or failure to deposit as ordered. The Appeal should have been heard and decided on merits on the issues raised and/or could have been raised including by the Respondent. In such an event the doctrine of merger would apply.

3. If the proceedings are pending before the same Appellate Tribunal the power under Section 35E can still be exercised by the Competent Authority. The doctrine of merger will not apply even if one of the Appeals is dismissed, provided the other appeal is pending.

4. Even if the Appeal preferred under Section 35B has been disposed off, an appeal can still be preferred pursuant to direction issued under Section 35E, if in the appeal disposed off, the entire order was not the subject matter of the Appeal."

4.9 We are satisfied that the test laid down by the Hon'ble High Court is applicable in the present case for us to hold so. It is quite interesting to note that applicant to the extent of demand made finds the order of NCLT binding and wants pronouncement in respect of the refund by this tribunal. Can we sit in judgement over the order of NCLT approving the resolution plan? Further issue of refund is any case not the issue raised in appeal it is for the applicant to approach the relevant authorities in the matter.

4.10 In view of above we dispose of the appeals and the miscellaneous application as follows:

5.1 The appeals filed abate as per the Rule 22 of the CESTAT Procedure Rules, 1982, with effect from the date of the approval of the resolution plan by the NCLT.

5.2 Since the appeals have abated the miscellaneous application filed by the applicant/appellant does not survive.

(Order pronounced in the open court on 19.10.2022)

(Sanjiv Srivastava)
Member (Technical)

(Ajay Sharma)
Member (Judicial)

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